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No.____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

PHILADELPHIA ELECTRIC COMPANY,
Petitioner-Appellant

v.

HERCULES INCORPORATED,
Respondent-Appellee

and

GOULD, INC.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Does physical damage to Petitioner's property constitute an injury in fact and, therefore, satisfy the federal constitutional requirement of standing for Petitioner to sue the party responsible for the damage?

2. Does physical damage to Petitioner's property resulting from pollution constitute a particularized harm of a kind different from that suffered by members of the public and, thus, give Petitioner a claim for relief under public nuisance?

3. Does a present owner of land have the right to sue, for indemnification, a former owner of the same land who polluted the land, the groundwater beneath and the Delaware River adjacent to the land, when the present owner was required by law to abate the pollution?

PARTIES TO THE PROCEEDING BELOW

The petition to this Court for a writ of certiorari to the United States Court of Appeals for the Third Circuit is sought by Philadelphia Electric Company, the plaintiff before the District Court for the Eastern District of Pennsylvania and the appellee before the United States Court of Appeals for the Third Circuit. Respondent Hercules Incorporated was a defendant before the District Court, and appellant before the Third Circuit Court. Gould, Inc. was a defendant before the District Court.

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OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania, denying Respondent's Post-Trial Motions, is reported at 587 F. Supp. 144 (E.D.Pa. 1984) and is set forth in the Appendix, at 33, for this Court's convenience.

The opinion of the Court of Appeals for the Third Circuit is reported at 762 F.2d 303 (3d Cir. 1985) and is

set forth in the Appendix, at 1, for this Court's convenience.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on May 28, 1985. Petitioner Philadelphia Electric Company timely filed a petition for rehearing, which petition was denied on June 21, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves, in part, an interpretation of Article III, Section 2 of the United States Constitution which provides, in relevant part, that:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; — to all Cases affecting Ambassadors, other public Ministers and Consuls; — to all Cases of admiralty and maritime Jurisdiction; — to Controversies to which the United States shall be a Party; — to Controversies between two or more States; — between a State and Citizens of another State; — between Citizens of different States; — between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT OF THE CASE

This lawsuit resulted from the pollution of a certain parcel of property located in Chester, Pennsylvania. In the years from 1945 to 1971 Pennsylvania Industrial Chemical Corporation ("PICCO") operated a synthetic hydrocarbon resin manufacturing and processing plant on the property in Chester, Pennsylvania ("Chester site"). The property lay adjacent to the Delaware River and at the time PICCO acquired the Chester site an inlet was located at the south end of the Chester site which opened into the Delaware River. Sometime after acquiring the Chester site, but during the period of time when PICCO conducted its resin manufacturing operation at the Chester site, PICCO filled in the shoreline at or about the inlet, thereby creating a lagoon or lake ("PICCO Lake"); PICCO also filled in other low lying areas on the property. During the course of its ownership and control of the Chester site, PICCO buried, deposited or placed resins, resin-laden materials and/or other by-products and chemicals used in its operation in the PICCO Lake and in various locations about the Chester property.

In 1971 PICCO ceased its operations at the Chester site and sold the property to Gould, Inc. ("Gould"). Gould did not conduct any operations at the Chester facility, other than leasing certain tanks to ABM Disposal Services Company ("ABM"). ABM did not store or dispose of resins or resinous by-products at the Chester site. In 1974 Gould sold the Chester site to Petitioner Philadelphia Electric Company ("PECO"). PECO has owned the property since 1974, and while PECO has leased sections of the property to third parties,[1] it has not undertaken any operations on the site.

In 1972, Hercules Incorporated ("Hercules") acquired PICCO, including PICCO's operations in Western Pennsylvania and Louisiana. As part of the

1. None of these third parties conducted resin manufacturing or storage operations.

acquisition of PICCO, Hercules expressly assumed "all of the debts, obligations and liabilities of PICCO," with certain exceptions not applicable to the instant claim.

Then, in 1980, the Pennsylvania Department of Environmental Resources ("DER") discovered that resinous materials were leaching from the banks of the Delaware River at the Chester site, and that the PICCO Lake was contaminated with resinous materials. On August 22, 1980, DER issued a citation against PECO, as owner of the property, for violation of the Pennsylvania Clean Streams Law, 35 Pa.C.S.A. §691.01 (Purdon 1977). The citation required PECO to abate the polluting condition at the Chester site, including the pumping of the PICCO Lake and the removal of soil contaminated by the resinous materials. After further investigation by PECO and DER, PECO removed the resinous materials from the site at a cost in excess of $340,000.00.

Thereafter, PECO instituted a Complaint against Hercules[2] alleging that the contamination caused by PICCO, in dumping its resinous materials, had polluted PECO's property, including the soils at the property; that the contamination continued to pollute the groundwater underneath the Chester site and had leached onto the banks of and into the Delaware River; and that PECO had been required by DER to abate the pollution. Jurisdiction was founded on diversity of citizenship.

Prior to trial and pursuant to Cross-Motions for Summary Judgment on the issue of Hercules' liability for PICCO's actions, the District Court held that Hercules had expressly assumed PICCO's liabilities and that Hercules' acquisition of PICCO constituted a *de facto* merger, which also imposed liability upon Hercules for PICCO's conduct.

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2. PECO also sued Gould, Inc., from whom it purchased the property, on the ground that Gould had failed to disclose the latent contamination. Prior to trial, and as a result of the discovery process, PECO determined its case against Gould was quite weak and settled with Gould for a nominal sum.

A jury trial commenced on June 29, 1983 and encompassed three days. During the course of that trial, PECO submitted expert evidence which virtually "fingerprinted" the pollutants found on the site as PICCO products. At the conclusion of the trial, the jury found, by Special Interrogatories, that PICCO caused the contamination of the Chester site and that the contamination was continuing to pollute the groundwater or the Delaware River (Appendix, at 57). Based on the jury's answers to the Special Interrogatories, the Court then entered a judgment against Hercules for the clean-up costs of $345,906.69, together with delay damages as provided by Pennsylvania Rule of Civil Procedure 238, and the Court required Hercules to abate the continuing contamination found by the jury to be present on and about the Chester site.

Hercules filed a Motion for Judgment Notwithstanding the Verdict or, In the Alternative, for a New Trial, on various grounds, including that the District Court had erred in holding Hercules liable for the conduct of PICCO, and that PECO had failed to state a claim for relief for private or public nuisance. The District Court denied Hercules' Post-Trial Motions and Hercules appealed to the Third Circuit Court of Appeals (Appendix, at 33).

On May 28, 1985, the Third Circuit Court of Appeals affirmed the District Court's determination that Hercules had expressly assumed the liabilities of PICCO and, additionally, that the acquisition of PICCO by Hercules constituted a *de facto* merger, thereby imposing liability on Hercules for the contamination caused by its predecessor in interest, PICCO. However, the Third Circuit Court of Appeals also held that PECO failed to state or prove a claim for relief for private nuisance, that PECO had no standing to sue for relief under public nuisance, and that PECO was not entitled to relief for indemnification (Appendix, at 16-31).

PECO timely filed a Petition for Rehearing in Banc with the Third Circuit on the grounds that PECO did have standing to maintain an action for public nuisance and that PECO was entitled to indemnification from Hercules. On June 21, 1985, the Third Circuit Court of Appeals denied PECO's Petition for Rehearing (Appendix, at 55).

REASONS FOR GRANTING CERTIORARI

I. The Third Circuit Court Of Appeals Erred In Holding That Petitioner Lacked Standing To Maintain An Action For Public Nuisance

The Third Circuit Court of Appeals' decision in this case contravenes the well-established rulings of the Supreme Court on the fundamental, federal constitutional issue of *standing*. Regardless of what uncertainties exist at the boundaries of the issue of standing, this Court has never waivered from the central position that a plaintiff which alleges an "actual injury" satisfies the constitutional mandate that a federal court exercise its power only over a "case" or "controversy." *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982); *Association of Data Processing Service Organizations, Inc. v. Camp*, 397 U.S. 150 (1970). Yet, the Third Circuit has held otherwise.

The Third Circuit found, in the instant case, that the owner of a property polluted by chemicals has *no standing* to sue, for damages and injunctive relief, the former owner of the property which caused the pollution, despite the uncontroverted facts that the property itself, the groundwater and an adjacent river were damaged by the pollution, the present owner spent over $340,000 to abate the pollution, and the pollution was continuing to cause damage. This unprecedented ruling by the Third Circuit turns the standing requirement on its head and is violative of Petitioner's federal constitutional right to

prosecute its claim in the federal courts. Moreover, the Third Circuit's ruling that Petitioner PECO had no standing to sue for a public nuisance neither estops, nor bars, Petitioner from relitigating its claims against Hercules, since such a ruling does not constitute a decision on the merits of Petitioner's claims. This Supreme Court, in its supervisory role, cannot permit such uncertainty to prevail in the Circuit Courts.

The question as to standing is required by the United States Constitution, Article III, Section 2, limitation which restricts federal court jurisdiction only to "cases" or "controversies." Whether a plaintiff will be accorded standing to litigate its claim in a federal court depends upon whether the plaintiff has " 'alleged such a personal stake in the outcome of the controversy' as to warrant [its] invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on [its] behalf." *Warth v. Seldin*, 422 U.S. 490, 498-99 (1975), *citing Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed. 663 (1962).

Moreover, since standing is an element of the federal constitutional concept of "case" and "controversy," "the federal courts must reach their own decisions without regard to what the state law in point may be." WRIGHT, THE LAW OF FEDERAL COURTS, §13 at 60 (4th ed. 1983). As Justice Powell noted in *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977): "[s]tate law of standing, however, does not govern such determinations in the federal courts. The constitutional and prudential considerations canvassed at length in *Warth v. Seldin* . . . respond to concerns that are peculiarly federal in nature." 429 U.S. at 262, n. 8 (citation omitted).

While this Supreme Court has applied "prudential" limits on who may invoke federal jurisdiction, in addition to the Article III constitutional mandate of a "personal stake in the outcome of the controversy," such limits have been applied only in two particular and narrowly

defined circumstances, neither of which is applicable to the instant case. First, a plaintiff may be precluded from litigating a claim in federal court if the asserted harm is in the nature of a generalized grievance shared in substantially equal measure by all or a large class of citizens because of the necessarily abstract nature of the injury all citizens share.[3] Thus, in *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208 (1974), a Committee of Reservists and five individuals were held not to have standing to claim that armed forces reserve memberships of members of Congress violated the incompatibility clause of the Constitution because, as citizens, their claim involved only the generalized interest of all citizens and, thus, their claim constituted a mere abstract injury rather than a concrete injury. In addition, as taxpayers, their claims failed to satisfy the demands of *Flast v. Cohen*, 392 U.S. 83 (1968). *See also United States v. Richardson*, 418 U.S. 166 (1974). Second, a plaintiff may be precluded from federal court litigation if such plaintiff attempts to assert the legal rights or interests of third parties. *See, e.g., Tileston v. Ullman*, 318 U.S. 44 (1943).

As indicated by this Court in *Warth v. Seldin, supra*, these "prudential" limitations, above and beyond the constitutional requirement, have been judicially imposed out of concern that:

> [w]ithout such limitations — closely related to Art. III concerns but essentially matters of judicial self-governance — the courts would be called upon to decide abstract questions of wide

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3. While it will be seen later that the language of this analysis is superficially similar to the analysis of the merits of Petitioner's claim under public nuisance, and that this superficial similarity may have led the Third Circuit astray, the requirements of standing are federal in nature while the requirements of a claim for public nuisance are state-law determinative. And in the difference therein hangs the Third Circuit's self-created confusion.

> public significance even though other governmental institutions may be more competent to address the questions and even though judicial intervention may be unnecessary to protect individual rights.

422 U.S. at 500. Such concerns derive from the federal judiciary's reluctance to intrude into areas of public interests more properly the province of the legislative or executive branches of government. *County Court of Ulster County v. Allen*, 442 U.S. 140 (1979).

In the instant case, which involves a dispute between private parties over a concrete injury to private property, such concerns are irrelevant. Thus, the "prudential" limitations imposed on the issue of standing are not implicated by the facts of the instant case, and so this Supreme Court need only consider whether Petitioner has satisfied the constitutional requirement of standing.

Standing, in the constitutional sense, is "an aspect of justiciability . . . surrounded by the same complexities and vagaries that inhere in justiciability." *Flast v. Cohen*, 392 U.S. at 98. And since the issue of justiciability goes to the heart of a federal court's existence, i.e. its power to hear cases, the constitutional dimension of the issue, and its articulation, has ebbed and flowed to some extent with the historical tides of a federal court's power vis-a-vis the legislative and executive branches of government. Thus, in the period prior to the 1960s a restrictive view of standing prevailed and a "direct injury" or "legal right" standard applied. *See, e.g., Tennessee Electric Power Company v. TVA*, 306 U.S. 118 (1930); *Frothingham v. Mellon*, 262 U.S. 447 (1923). During the 1960s, a line of cases expanded the notion of standing and, therefore, access to federal courts, so long as a plaintiff could show "injury in fact", or a personal stake in the outcome of the controversy in order to assure a concrete adverseness. *See, e.g., Flast v. Cohen, supra; Baker v.*

Carr, 369 U.S. 186 (1962). As the doctrine of standing evolved, private parties were also granted standing to contest federal administrative actions so long as they suffered an "injury in fact" as a result of the challenged action and their interest was within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question. *See, e.g., Sierra Club v. Morton*, 405 U.S. 727 (1972); *Association of Data Processing Service Organizations, Inc. v. Camp, supra; Barlow v. Collins*, 397 U.S. 159 (1970). But also, in the 1970s, and continuing into the present decade, a contraction of standing has occurred. *See, e.g., United States v. Richardson, supra; Schlesinger v. Reservists Committee to Stop the War, supra.* These cases, "building heavily on a renewed emphasis on separation of powers principles, make it clear that a direct injury, and not merely a general interest common to all members of the public, is required for standing." WRIGHT, LAW OF FEDERAL COURTS, §13, at 67 (4th ed. 1983).

In spite of the complexities and vagaries which may exist at the borders of the doctrine of standing, the central theme of the doctrine of standing has remained fixed: A plaintiff which has suffered an injury in fact, is accorded standing by the federal constitution to seek redress in a federal court. Or, in perhaps the clearest and most succinct articulation of the constitutional standard, "[t]he plaintiff must show that he himself is injured by the challenged action of the defendant." *Village of Arlington Heights v. Metropolitan Housing Development Corporation*, 429 U.S. 252 (1977).

When private plaintiffs assert a right to contest a federal statute or federal administrative agency action, such plaintiffs must demonstrate their interest in, and the effect on them of such statute or action in order to satisfy the standing requirement. But, when the claims before the federal court are asserted by one private party against another private party for damages to private property resulting from, and for injunctive relief against, the

defendant's conduct, the issue of standing is rarely addressed because standing to bring the lawsuit is uncontrovertible:

> [t]he law of standing is almost exclusively concerned with such public law questions as determinations of constitutionality and review of administrative or other governmental action. In theory, of course, it is not so limited. The person suing for breach of contract or for a tort must satisfy the court that he has standing to bring such a suit, but in practice such suits are brought only by a person harmed by the supposed wrong and his standing to sue is self-evident.

WRIGHT, LAW OF FEDERAL COURTS, §13, at 60 (4th ed. 1983). Yet, the holding by the Third Circuit Court of Appeals in the instant case certainly distorts and confuses what otherwise was a clear corollary of the doctrine of standing in the federal courts.

The Third Circuit has held in effect in this case that even if a private party plaintiff alleges, and proves, that it has suffered monetary damages, in excess of $340,000, as a result of the private defendant's conduct, nevertheless such a plaintiff has no constitutional right to stand in federal court to seek redress of its complaints. On its face, such a holding destroys the axis around which the doctrine of standing turns. It is a holding which violates Petitioner's rights under the federal constitution, and it flies in the face of every decision on standing enunciated by the Supreme Court.

Even looking beyond the face of the decision, the holding cannot withstand constitutional scrutiny as a simple recital of the pertinent facts of the case reveals. Petitioner owned land in Chester, Pennsylvania which land bordered the Delaware River. In 1980 it was discovered that the land (private property), the groundwater beneath the land and the Delaware River adjacent to

the land (public property) had been contaminated as a result of the industrial practices of a former owner of the land. Petitioner attempted to abate the pollution, at a cost in excess of $340,000, and pursuant to the express requirements of Pennsylvania law and at the direction of the Pennsylvania Department of Environmental Resources. Petitioner then brought the instant lawsuit against Respondent, the party responsible for the pollution, claiming that Respondent's conduct constituted a private and/or public nuisance.

A jury found that Respondent was responsible for the pollution of Petitioner's property and that, indeed, the pollution was continuing to contaminate the groundwater beneath the property or the Delaware River adjacent to the property. *See* Jury Answers to Special Interrogatories, Appendix, at 57. The District Court entered judgment on the jury's verdict and ordered Respondent to abate the continuing pollution. Respondent then filed Post-Trial Motions with the District Court on the grounds, in part, that Respondent had not assumed the liabilities of PICCO, and that Petitioner had failed to state a claim for relief for private or public nuisance. The District Court denied Respondent's Post-Trial Motions (Appendix, at 33).

On appeal the Third Circuit affirmed the District Court's ruling that Respondent was responsible, as a successor corporation, for the acts of PICCO, the polluter (Appendix, at 8-16). The Third Circuit also held that Petitioner had failed to plead, or prove, a cause of action in private nuisance (Appendix, at 16-22).

The Third Circuit then turned its consideration to Petitioner's public nuisance theory of recovery and posited: "[t]he question before us is whether PECO has *standing* to bring an individual action for damages or injunctive relief for interference with a public right." (Appendix, at 24, emphasis added).

The Court's answer to the question can be formulated, in summary fashion, as follows:

> [t]o recover for public nuisance a party must have been exercising a right common to the public, which right was interfered with by Respondent's conduct.
>
> Petitioner was not actually using the Delaware River, the use of which waters constituted the public right.
>
> Therefore, Petitioner had *no standing* to sue Respondent.

Nowhere in this implied syllogism nor in the exposition of the Third Circuit's holding is there any consideration of whether Petitioner suffered an injury in fact, or satisfied any other standard for determining whether Petitioner fulfilled the constitutional requirement of standing. Nevertheless, at the beginning of its discussion in regard to the public nuisance issue, the Circuit Court contended that the issue depends on whether Petitioner had standing, and at the end of its discussion the Court held that Petitioner "lacks standing" (Appendix, at 25).

Petitioner respectfully submits that the Third Circuit could not have meant what it said in regard to Petitioner's *standing* to bring a claim for public nuisance. Rather than addressing the issue of standing, as the Circuit Court claimed, it seems that the Third Circuit was attempting to address the merits of Petitioner's claim for public nuisance. It can be postulated only that the Circuit Court intended to hold that Petitioner had failed to allege or prove one element of a cause of action in public nuisance. This is the only sensible interpretation of the Circuit Court's analysis and opinion. The Circuit Court reasoned that to recover under a public nuisance claim, Petitioner must have suffered harm of a kind different from that suffered by other members of the public "exercising the right common to the general public that was the subject of interference." The Court then found

that the public right at issue was the right to "pure water," and Petitioner did not allege that "it used the waters of the Delaware River itself, or that it was directly harmed in any way by the pollution of those waters" (Appendix, at 24-25).[4] Rather, the Circuit Court found, in a display of convoluted logic, that the contamination of Petitioner's property was the cause of the pollution of the Delaware River, not the result of the pollution, and Petitioner was "harmed only in the exercise of its private property rights over the Chester site" (Appendix, at 25). Therefore, the Court held that Petitioner "lacks *standing* to sue for public nuisance" (Appendix, at 25; emphasis added).

Thus, the Circuit Court took Petitioner's claim for public nuisance and erroneously held that Petitioner lacked standing to sue, when it presumably intended to dispose of Petitioner's claim on the merits, i.e. failure to state a claim for public nuisance. Such error by the Third Circuit is neither a mere slip of the pen, nor harmless. Such error is reversible.

There can be no question that Petitioner has alleged and proven that it suffered an actual, concrete injury in fact sufficient to satisfy the federal constitutional requirement of standing. Therefore, the Third Circuit's decision must be reversed as it violates Petitioner's federal constitutional rights. If the error is not reversed, it not only violates individual Petitioner's rights, it also threatens to wreak havoc on the federal court system.

For if the Third Circuit, or any other Circuit Court, is permitted to deny plaintiff an entitlement to relief, after a full trial on the merits, on the ground of lack of standing, when the Court presumably meant to dispose of the case on the merits, then the Circuit Court thereby

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4. The Third Circuit completely ignored the allegation and uncontradicted proof that the pollution caused by Respondent harmed Petitioner's property, namely the soils at the property, and contaminated the public groundwater beneath Petitioner's property. See District Court Opinion, Appendix, at 33.

destroys the finality to the case and reopens the case for further litigation. For denial of relief on the ground of standing does not reach the merits of the case, and therefore, does not serve to bar a relitigation of the same dispute.

"For it is well settled that the failure to state a proper cause of action calls for a judgment on the merits and not for a dismissal for want of jurisdiction." *Bell v. Hood*, 327 U.S. 678 (1946); *see also Baker v. Carr, supra*. It is equally well settled that dismissal of an action for lack of standing does *not* call for a judgment on the merits and therefore does not act as a bar to a later suit, on the very same facts. WRIGHT, LAW OF FEDERAL COURTS, §13, at 67-68 (4th ed. 1983).

For instance, in *McCarney v. Ford Motor Company*, 657 F.2d 230 (8th Cir. 1981), a former automobile dealer sued an automobile manufacturer claiming that the manufacturer had forced the former dealer to sell his dealership at a low price by harassing and unfairly treating the former dealer. In an earlier case, the former dealer claimed that defendant manufacturer, through a campaign of harassment and unfair dealing, compelled the dealer to sell his dealership, which sale allegedly was at an unfavorable price. In that earlier case the former dealer filed suit in federal court claiming violation of the Automobile Dealers' Day in Court Act, 15 U.S.C. §1221 *et seq.*, and the District Court had granted Defendant's motion for summary judgment on the ground that the former dealer, as an individual, lacked standing under the federal statute.

The former dealer did not appeal the first case, but instead filed a second action claiming entitlement to relief, upon the same facts, under the Sherman Act; a state statute prohibiting termination of a supply contract without good cause; wrongful termination; breach of fiduciary duty; and wrongful interference with a contract.

In the second action, the defendant manufacturer was granted summary judgment by the District Court,

on the grounds of res judicata and collateral estoppel because of the dismissal of the earlier case brought by the same plaintiff against the same defendant. On review, the Eighth Circuit Court defined the issue as follows: "[t]he case presents the difficult but narrow issue of whether a dismissal for lack of standing to invoke a particular statute can act as a bar to a later suit based upon the same factual allegations." 657 F.2d at 231. The Circuit Court held that it did not, and reversed and remanded the case.

In so ruling, the Eighth Circuit found that the District Court's holding in the first case was somewhat ambiguous in that the District Court mixed its analysis of lack of standing and failure to state a claim upon which relief could be granted, but nevertheless, the Eighth Circuit Court concluded that in the original District Court decision, "the judgment was based upon lack of standing and not that the plaintiff failed to state a claim upon which relief could be granted." 657 F.2d at 232, n. 4.

The Eighth Circuit went on to reason that, "[t]he Supreme Court has expressly delineated a distinction between the issue of standing and the merits of a particular lawsuit." 657 F.2d at 232-233, relying on *Warth v. Seldin*, 422 U.S. 490 (1975). The Circuit Court then held:

> [w]e hold, therefore, that a dismissal based upon a lack of standing is not 'on the merits' of the underlying substantive claim and is not a bar to asserting another theory of relief based upon the same operative facts assuming the other elements of claim preclusion are satisfied.

657 F.2d at 234.

The Third Circuit in the instant case has committed the very same error as the District Court in the first *McCarney* case: it has confused the issue of standing with that of whether there was a failure to state a claim for

relief. This Supreme Court must not allow such confusion to exist in the Third Circuit, or any other Circuit, because to do so would reopen the courtroom door to lawsuits that otherwise should be barred. Nor is such error harmless as to Petitioner. As more fully discussed in the following section, if the Third Circuit Court of Appeals had analyzed the issue in terms of whether Petitioner had stated a claim for relief for public nuisance instead of confusingly determining that Petitioner lacked standing to sue, then it is submitted the result of the Circuit Court's decision would have been quite different.

Therefore, Petitioner respectfully requests that its Petition for Certiorari be granted and, after full consideration by this Court, that the judgment of the Third Circuit be reversed.

II. Petitioner Has Stated And Proven A Claim For Relief Under Public Nuisance

If the Third Circuit Court had not been confused and had clearly examined and analyzed whether Petitioner had stated and proven a claim for relief under public nuisance, then the Third Circuit undoubtedly would have reached a different result. Under the law of public nuisance a plaintiff must only prove "particular" damages from the alleged wrong, and physical harm to a plaintiff's land has always been held to be such particularized harm. Restatement (Second) of Torts, §821 C. In the instant case, Petitioner PECO most assuredly alleged and proved physical harm to its land as a result of the public nuisance for which Respondent was held liable. Yet the Third Circuit has confused this requirement with the constitutional requirement that a party must have standing to sue in federal court.

Petitioner respectfully posits that the confusion resulting in the Third Circuit's decision is as follows: standing focuses on the party seeking to get his complaint before the federal court, rather than on the issue

the party seeks to have adjudicated. *Schlesinger v. Reservists Committee to Stop the War, supra.* A claim for public nuisance is, of course, the issue to be adjudicated in the instant case.

In analyzing for the presence of standing, the federal court must examine whether the impact on the plaintiff of the action or statute is plainly undifferentiated and common to all members of the public. If it is, then plaintiff has not alleged "some particularized injury that sets him apart from the man in the street." *United States v. Richardson,* 418 U.S. at 2955 (Powell, J., concurring). And plaintiff would have no standing because plaintiff has alleged or proven only an abstract dispute.

In analyzing a public nuisance claim *on its merits,* the plaintiff must plead, and prove, a particular damage, different in kind and degree from that suffered by the general public. Restatement (Second) of Torts §821C. The requirement of demonstrating "particular" damage was intended to limit access in the courts for complaints about public matters, in as much as complaints about public matters were the sole and proper province of duly-constituted public officials. *See* PROSSER, *Private Action for Public Nuisance,* 52 Va.L.Rev. 997 (1966). However, physical injury or property damage have *always* been deemed damages "particular" enough to satisfy a claim for relief under public nuisance. PROSSER AND KEETON ON TORTS, §90, at 648 (5th ed. 1984); PROSSER, *Private Action for Public Nuisance,* 52 Va.L.Rev. 997, 1011-12 (1966). Later, the scope of recovery for public nuisance was broadened to allow recovery so long as the plaintiff's damages were different in kind and degree from those suffered by the general public and such damages were suffered while the injured party was exercising a right common to the general public. Restatement (Second) of Torts, §821C; PROSSER, *supra.*

A paradigm of the boundaries that constitute "particular damage" suffered by one exercising rights common to the public is found in the case of *Burgess v. M/V Tamano*, 370 F. Supp. 247 (D.Me. 1973), *aff'd*, 559 F.2d 1200 (1st Cir. 1977) (see Appendix, at 23, n. 11). In *Burgess*, plaintiffs, in class actions, sought recovery for damages incurred as a result of the discharge of approximately 100,000 gallons of oil from a tanker, the M/V Tamano, into the waters of Casco Bay in Maine. Defendants were the ship, owners, captain, pilot and local pilots' association, as well as the charterer, the State of Maine and the United States. Liability was asserted on theories of negligence, unseaworthiness, trespass and nuisance, as well as under the Rivers and Harbors Act of 1899, 33 U.S.C. §407 and Water Quality Improvement Act of 1970, 33 U.S.C. §1161(b)(2). However, the Court noted that: "[p]laintiffs' principal claims sound in nuisance, and, although they also assert claims based on negligence, unseaworthiness, trespass and statutory violations, it is not suggested that their right to recover damages for pecuniary losses sustained by them as a result of the spill may differ according to the theory upon which they predicate defendants' liability." 370 F. Supp. at 250, n. 2. Thus, the Court analyzed the claims under a public nuisance theory.

Defendants filed motions to dismiss the claims of three of the plaintiff classes: the commercial fishermen; the commercial clam diggers; and the owners of the motels, trailer parks, camp grounds, restaurants, grocery stores and similar businesses which depended on the tourist trade and which were adversely affected by the oil spill. Defendants contended that economic loss, including loss of profits and impairment of earning capacity, were not legally cognizable damages, under a theory of public nuisance, among other theories, because none of the plaintiffs in question had any property interest in the

waters or marine life or shores claimed to have been polluted. The District Court held that, "the motions to dismiss the claims of the commercial fishermen and clam diggers must be denied, but that the motions to dismiss the claims of the . . . businessmen, *other than those who owned shore property physically injured by the spill,* must be granted." 370 F. Supp. at 249 (emphasis added).

The District Court differentiated the commercial fishermen and clam diggers, on one hand, from the businessmen, on the other hand, as follows:

> [t]he commercial fisherman and clam diggers in the present cases clearly have a special interest, quite apart from that of the public generally, to take fish and harvest clams from the coastal waters of the State of Maine. The injury of which they complain has resulted from defendants' alleged interference with *their* direct exercise of the public right to fish and to dig clams.

370 F. Supp. at 250.
On the other hand, the business owners:

> do not assert any interference with *their* direct exercise of a public right. They complain only of loss of customers indirectly resulting from alleged pollution of the coastal waters and beaches *in which they do not have a property interest.* Although in some instances their damage may be greater in degree, the injury of which they complain, which is derivative from that of the public at large, is common to all businesses and residents of the . . . [affected] area.

370 F. Supp. at 251 (emphasis added).
The line drawn by the District Court is such that those parties which were directly affected by the pollution can recover but not those parties only indirectly affected. In the former category are those who owned shore property

physically injured by the spill as well as commercial fishermen and clam diggers; in the latter category are those who suffered indirect business losses from the spill.

The Court's emphasis on the fact that the commercial fishermen and clam diggers were actually and directly *exercising* the use of the right to fish and to dig clams was necessary to set them apart from the tourist-trade businessmen because traditionally only one whose property was damaged would recover and the fishermen and clam diggers had no proprietary interest in the public waters.

What remains clear in the District Court's reasoning is that it is uncontested that one whose property was damaged can recover for public nuisance, irrespective of whether the property owner was *exercising* rights common to the public.

In the instant case, Petitioner PECO proved that its property was damaged, to the extent that Petitioner incurred over $340,000 in costs to remove contaminated soil from the property, and that the public groundwater beneath the Delaware River adjacent to Petitioner's property was also polluted by PICCO's operations. Even the Third Circuit Court of Appeals did not contest the fact that a public nuisance was created by PICCO, and that Respondent Hercules was liable for PICCO's actions. (Appendix, at 8-16). Yet, the Third Circuit erroneously reasoned that Petitioner PECO did not have standing because it was not exercising the right to use the public waters of the Delaware River, unlike the commercial fishermen in the *Burgess* case, and, therefore, PECO could not maintain an action for public nuisance. Thus arises the Third Circuit's confusion of federal standing requirements and the elements which must be satisfied in order to recover for public nuisance.

This result is contrary to the uncontested rule of law that if an owner of property suffers damage to that property as a result of a nuisance which *also* affects public rights, then the property owner is entitled to maintain an

action for public nuisance. *See, e.g., Heinl v. Pecher*, 330 Pa. 232, 198 A. 797(1938); *Akau v. Olomana Corporation*, 65 Hawaii 383 (1921); *Frady v. Portland General Electric Co.*, 637 P.2d 1345 (Or.App. 1981); Prosser, *Private Action for Public Nuisance*, 52 Va.L.Rev. 997, 1018 (1966). Only if the claimant has not suffered property damage, or personal injury, is it necessary to determine if the damage which is alleged was of a nature different in kind and degree from that suffered by the general public in the exercise of a public right.

III. The Third Circuit Erred In Holding That Petitioner PECO Is Not Entitled To Indemnification From Hercules

The Third Circuit has also held that PECO is not entitled to indemnification from Hercules because PECO could not have been compelled through legal action taken by DER pursuant to the Clean Streams Law to incur the abatement expenses for the nuisance created by Hercules.

However, §691.316 of the Clean Streams Law specifically provides in pertinent part:

> [w]henever the department finds that pollution or a danger of pollution is resulting from a condition which exists on land in the Commonwealth the department may order the landowner or occupier to correct the condition in a manner satisfactory to the department or it may order such owner or occupier to allow a mine operator or other person or agency of the Commonwealth access to the land to take such action. For the purpose of this section, "landowner" includes any person holding title to or having a proprietary interest in either surface or subsurface rights.

Under the Pennsylvania Clean Streams Law, "pollution" is defined as "contamination of any waters of the Commonwealth such as will create or is likely to create a nuisance." 35 Pa. C.S.A. §691.1 (Purdon 1977). The jury specifically found that Hercules had created a nuisance which was polluting or contaminating the Delaware River and the groundwater beneath the Chester site. PECO removed the contamination left by PICCO and then sued Hercules to recover the costs of the cleanup, as it is entitled to under principles of indemnification. As articulated by the Court in *Builders Supply Co. v. McCabe*, 366 Pa. 322, 325, 77 A.2d 368, 370 (1951):

> [t]he right of *indemnity* rests upon a difference between the primary and the secondary liability . . . . It is a right which enures to a person who, without active fault on his own part, has been compelled, by reason of some legal obligation, to pay damages occasioned by the initial negligence of another, and for which he himself is only secondarily liable.

The Court continued:

> secondary as distinguished from primary liability rests upon a fault that is imputed or constructive only, being based on some legal relation between the parties, or arising from some positive rule of common or statutory law or because of a failure to discover or correct a defect or remedy a dangerous condition caused by the act of the one primarily responsible.

366 Pa. at 328, 77 A.2d at 371.
See also, Mixter v. Mack Trucks, Inc., 224 Pa. Super. 313, 308 A.2d 139 (1973); Restatement of Restitution, §§95, 96 (1937).

The instant case falls squarely within the protection afforded by the law of indemnification. PECO was required by Pennsylvania law to abate the nuisance only

because of PECO's status as landowner. *See* Clean Streams Law, 35 Pa.C.S.A. §691.316 (Purdon 1977); *National Wood Preservers, Inc. v. Commonwealth Department of Environmental Resources,* 489 Pa. 221, 414 A.2d 37 (1980). PECO's liability was imputed, constructive and statutory, i.e. secondary. Under the law of nuisance, PECO is entitled to recover from the party which is primarily liable for creating the nuisance, PICCO/ Hercules. That is what the jury found and the District Court affirmed.

The Third Circuit attempts to justify not shifting the responsibility to Hercules where it properly lies on the basis that Hercules was not the culprit, rather it was PICCO. But such an "equitable" analysis contradicts the Third Circuit's holding that Hercules *is* PICCO by virtue of the *de facto* merger doctrine and the Panel's holding that: "Hercules has [expressly] assumed any liability PICCO may have had due to the pollution of the Chester site." (Appendix, at 11). Surely PICCO (ergo Hercules) "was best suited to prevent the pollution." There can be no question but that PICCO, if it had not been merged into Hercules, would have had to answer to PECO for indemnification. Nevertheless, the Third Circuit seemed to be swayed by the "fairness" of making PECO bear the responsibility because "PECO had an opportunity to protect itself through inspection and negotiation . . ." (Appendix, at 30). But even if that consideration had *any* bearing on the issues, it ignores the reality of the case and the evidence. PECO asserted, and evidence so established, that the buried contaminants were a latent condition undiscovered until years later. Indeed, Hercules' defense proffered through former PICCO employees was that PICCO had not deposited the pollutants of which PECO and DER complained.

It is difficult to understand why the Third Circuit believed it is fairer to shift the burden for this nuisance to PECO, who certainly had nothing to do with its creation, rather than to the party who created it. Once the

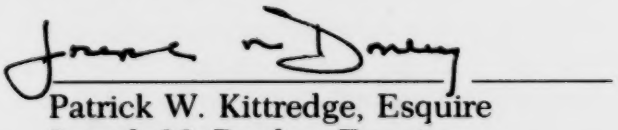
Third Circuit determined that Hercules assumed the liability for the Chester site, it acknowledged that Hercules is primarily liable and it, not PECO, should bear the burden of abatement.

CONCLUSION

The decision of the Third Circuit Court of Appeals in this case presents a grave disruption of the well-established principles of *standing* as defined by the prior decisions of this Court. This unprecedented ruling by the Third Circuit seriously muddles the federal constitutional issue of standing with an analysis of whether Petitioner failed to state a claim upon which relief could be granted. Regardless of the intention of the Third Circuit, its decision violates Petitioner's federal constitutionally protected right in specifically holding that Petitioner had no standing to sue for public nuisance. Moreover, the decision of the Third Circuit wreaks havoc on the federal court system by destroying the finality of the case and reopens the case for further litigation, since a denial of relief on the ground of standing does not reach the merits of the case. Nor was the fundamental error committed by the Third Circuit harmless as to Petitioner. A proper analysis of Petitioner's public nuisance claims would have resulted in the inexorable conclusion that Petitioner was entitled to its judgment against Respondent for monetary and injunctive relief for the pollution of its property.

Accordingly, Petitioner respectfully submits that this Court should grant a writ of certiorari to review the decision and judgment of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,



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I certify that three copies of this Petition for Writ of Certiorari were mailed pursuant to Supreme Court Rule 28.3 by United States mail, first class postage, prepaid this day of September, 1985, to:

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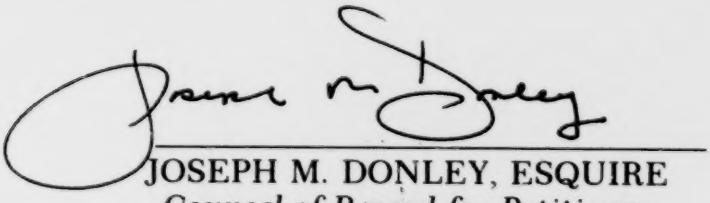

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